STATE OF MICHIGAN
IN THE SUPREME COURT
(On Application for Leave to Appeal from the Court of Appeals, Bandstra, P.J. Fitzgerald and Sawyer, J.J.)

KENNETH R. DEYO,

Plaintiff/Appellant,

vs.

VICKI E. DEYO,

Defendant/Appellee.
_____/

Supreme Court No.:
Court of Appeals No.: 245210
LC No: 01-30982-DM

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DEFENDANT-APPELLEE'S OPPOSSING BRIEF TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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PROOF OF SERVICE

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Dated: September 3, 2004

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The Court of Appeals decision dated May 25, 2004 affirmed the trial court's Judgment of Divorce resolving all matters in that divorce action. The Court of Appeals did deny Plaintiff/Appellant's Motion for Reconsideration on June 6, 2004.

Defendant/Appellee requests that this Court deny Plaintiff/Appellant's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does Plaintiff/Appellant's application show that the issues involved legal principals of major significance to the State's jurisprudence and that the decision of the Court of Appeals is clearly erroneous and will cause material injustice, or that the decision conflicts with the Supreme Court decision or another decision of the Court of Appeals?

Trial Court did not answer this question.

The Court of Appeals did not answer this question.

Plaintiff/Appellant would say yes.

Defendant/Appellee would say no.

2. Did the Trial Court properly award the bulk of the marital estate to the Defendant/Appellee and also award Defendant a portion of inheritance obtained by the Plaintiff/Appellant and further award $200.00 per week in spousal support after makings of findings of fact as to the duration of the marriage, contribution of the parties to the marital estate, age of the parties, health of the parties, lifestyle of the parties, necessities and circumstances of the parties, earnings abilities of the parties, past relations and conduct of the parties, general principles of equity, and further after making a finding that the Defendant/Appellee made contributions in obtaining the inherited property?

Plaintiff/Appellant would say no.

Trial Court would say yes.

Defendant/Appellee would say yes.

COUNTER-STATEMENT OF FACTS

Although the Plaintiff failed to indicate in his brief, the parties hereto were married on July 27, 1977 making this a marriage of twenty-five years. At the time of trial, Plaintiff was 47 years of age and the Defendant 44 years of age. There were two children borne of this marriage. At the start of trial, those children, Jeannette K. Deyo, and Christine M. Deyo, were 21 and17 years of age, respectively.

Plaintiff testified that the two separated on the day he filed his complaint for divorce. See August 27, 2002 transcript, page 69, lines 19 and 20.

Through most of the marriage, Defendant was a stay-at-home parent. Very early in the marriage Defendant was employed at a bank but quit when the children arrived. During the marriage, Defendant did work as a lunchroom aide making less than $1,000.00 per year in the few years she did so. There was no testimony at trial indicating that Defendant did anything that would provide her with skills to work at a decent wage in the workforce. Although Plaintiff failed to indicate this lack of marketable skills in his brief, he did correctly point out in his brief that at the time of trial the Defendant was physically able to work outside the home.

Plaintiff, during most of the marriage, was employed with Holy Sepulchre Cemetery. As Plaintiff indicates in his brief, his employment was the source of the regular income. As he points out in his brief, Plaintiff earned during his last few years approximately $25,000.00 per year. His employment benefits included a pension in the amount of $500.00, monthly.

Both Plaintiff and Defendant inherited substantial sums of money during the marriage. Early in the marriage, Defendant testified that she inherited approximately $100,000.00 upon the passing of her parents. The inheritance was commingled with family assets and used to buy the marital home and other assets. (See September 4, 2002 transcript, pages 62 and 63). That sum

of money was needed as Plaintiff had a meager income and Defendant worked raising the family. As Defendant testified, she considered everything marital. She took things in as a marriage. (September 4, 2002 transcript, page 62, lines 4-8).

The parties had a very frugal life style. Defendant testified that most of the furnishings for the house were purchased at garage sales. (September 4, 2002 transcript, page 161, lines 10-21). Defendant testified that she purchased her clothing at re-sale shops. (September 4, 2002 transcript page162, line 2). The children were purchased new clothing, however. (September 4, 2002 transcript, page 161, lines 23-25). This lifestyle lasted the entire marriage. Plaintiff's claim that Defendant was a big spender was simply not true and certainly not supported with any evidence.

Plaintiff's father died in 1997. Before Plaintiff's father died, he needed substantial assistance and care. Plaintiff testified that the Defendant rarely, if ever, cared for his father. (September 4, 2002 transcript, pages 6-13). Plaintiff testified that he hired professional staff to care for his father. Upon cross-examination and later testimony from Plaintiff, it was learned that he hired his father's girlfriend (September 4, 2002 transcript, page 15, lines 13 and 14) and Defendant's brother. Plaintiff also testified that he quit his job at the Cemetery and paid himself from his father's assets (August 27, 2002 transcript, page 78, lines 16 – 18) to take care of his father. (August 27, 2002 transcript, page 78, lines 16-18). He did so even though others were already doing so. He never testified giving Defendant credit for the care she gave his father.

Defendant did care for Plaintiff's father. It should be noted that Plaintiff admitted that his father was a very difficult person to deal with, especially for women. An unbiased neighbor, Debbie Mathes, testified that in fact Defendant cared for Plaintiff's father at his residence and provided three meals per day on a consistent regular basis for a period of approximately three

years. (September 5, 2002 transcript, pages 69 – 72, page 74). To add credibility to her testimony, Ms. Mathes indicated that Plaintiff's father and Defendant had a "rocky relationship"; however, Defendant provided this nurturing care regardless.

Defendant also testified at great length about her care for her father-in-law. (September 4, 2002 transcript, page 131 and pages 133). In fact, it was Defendant, not Plaintiff, that provided the care for Plaintiff's father. One could conclude that it was this care that paved the way for the inheritance to Plaintiff.

Plaintiff inherited assets from his father's estate in 1997. According to Defendant, the parties contemplated for years what they would do when they inherited Plaintiff's father's estate. They spoke with their children about the vacations or other plans when they did inherit the estate. (September 4, 2002 transcript, page 64, lines 3-9). So the parties did plan on the inheritance and planned on using it as marital funds. Even during that last 10 years of the marriage, when the marriage deteriorated, the talk was still that the inheritance was to be marital property. (September 4, 2002 transcript, page 64, line 22-25, and page 65, line 1).

But when the inheritance came, Plaintiff changed his tune. Up to that point, everything was "theirs". Now, it was mine (Plaintiff's). (September 4, 2002 transcript, page 64, lines 10-12).

His father's gross estate amounted to approximately $3,628,000.00, according to the Estate's Federal 706 form filing. (See August 27, 2002 transcript, page 28, lines 21 and 22). Of that amount, $1,460,000.00 was held as real estate, $2,073,00 in stocks and bonds, $16,000.00 in cash and $79,000.00 in miscellaneous property. (See Tr1, page 29, lines 9 – 13). The value of the real estate was set pursuant to stipulation of the parties or through uncontested evidence of an expert.

Tim White, from Ferris, Baker, Watts Brokerage, testified that Plaintiff's father, at the time of his passing, held approximately 1.5 million worth in stocks and bonds. However, out of that $450,000.00 went to pay estate taxes. By trial the asset had dwindled down to $448,000.00 net after taking into account a $330,000.00 margin. Plaintiff admitted at trial that he had paid the margin calls and attempted to account for the same. However, upon attempting to account for the sums of money, Plaintiff was unable to account for $57,382.00, which he claimed were payments against the margin. (See September 3, 2002 transcript, page 70). One can only conclude that the Plaintiff was attempting to hide money that he obtained.

With the passing of Plaintiff's father and the inheritance, the parties' income did increase substantially. The parties 1997 adjusted gross income increased to $79,466.00 (August 27, 2002 transcript, page 22, lines 15 and 16), the 1998 adjusted income increased to $197,000.00 (August 27, 2002 transcript, page 25, lines 1 and 2), and the 1999 adjusted income to $178,000.00 (August 27, 2002 transcript, page 26, lines 2 and 3). Plaintiff was able to reduce his 2000 income to $80,000.00. (August 27, 2002 transcript, page 27, line 13). The tax returns were admitted into evidence. (August 27, 2002 transcript, pages 23 and 24). The Plaintiff's income averaged over the years 1997, 1998, and 1999 approximately $151,000.00 per year.

Plaintiff argues in his brief that approximately $50,000.00 in bearer bonds inherited was "missing" and he implies that the Defendant was responsible. Plaintiff failed to indicate that there was a lack of evidence in support of such an allegation. The Court did not find credible evidence implicating the Defendant.

The trial court did find Plaintiff at fault for the breakdown of the marriage. The fault was in the form of physical violence and extra-marital affairs.

Plaintiff denied at trial that he had an extra-marital relationship. (September 3, 2002 transcript, pages 26 and 27). Plaintiff's testimony was that this other woman, Christine Angelosanto, was just a good friend. Plaintiff fails, however, in his brief, to indicate that he admitted at trial to telling other persons that he had a sexual relationship with another women. (September 3, 2002 transcript, page 26, lines 11-13). Defendant offered as evidence pictures of Plaintiff dancing with this other woman. (September 3, 2002 transcript, page 37, line 12). It so happens that this occurred in the presence of the minor children. Apparently, Plaintiff had his children when he was with this other woman on other occasions as well. (September 5, 2002 transcript, page 67, lines 13-14). Defendant also produced a jewelry receipt (September 5, 2002 transcript, page 69 and 70) which could not be explained by Plaintiff.

The other woman also testified. She denied any improper relationship. When confronted with a "love letter" she sent to the Plaintiff, she indicated that she "loves" all of her friends. (September 5, 2002 transcript, page 54, lines 1-6 and September 5, 2002 transcript, page 55, lines 2-8). Then, the witness was asked to read one of her letters to Plaintiff into the record. (September 5, 2002 transcript, page 55, beginning at line 20). The letter can only be identified as a "love letter." Nonetheless, the Plaintiff and his lover tried to convince the judge that they were only "good friends."

Further, Plaintiff generally denied physical abuse. He did make somewhat of an admission of it at trial. (September 5, 2002 transcript, page 119). There was testimony to establish the violence from both the Defendant and Ms. Mathes. (September 5, 2002 transcript, page 113, lines 8-12). There was also photographic evidence of Defendant's facial bruising following a beating at the hands of Plaintiff. (Defendant's Exhibits 6A-D, September 5, 2002 transcript, page 116, line 18 and September 5, 2002 transcript, page 78, lines 20-25).

Despite this abuse and extra-marital affair, the Defendant did stay married to the Plaintiff. She endured for the sake of the children. Divorce was not an option for the Defendant. (September 4, 2002 transcript, page 71, lines 5-25).

Plaintiff also complained to the Court that Defendant had poisoned any relationship that he might have with either of the children. This was not supported at trial. Dr. Richard Zipper, Again, Plaintiff's testimony cannot be believed in that Dr. Richard Zipper testified there was absolutely no evidence of parental alienation on behalf of the Defendant. In fact, Dr. Zipper testified that the Defendant "did bias Christine in favor of her father...". (September 4, 2002 transcript, page 84, lines 6-9). It is clear that the Defendant attempted to paint an unrealistically pleasant portrayal of the Plaintiff to the children to protect them from the fact of what a true scoundrel he really was. Dr. Zipper testified subsequent that when the children learned what a scoundrel Plaintiff was, it was even a bigger disappointment in that the Defendant had inflated his attributes beyond reality to the children. (See September 4, 2002 transcript, page 84, lines 11-21).

Further, it should be noted that Plaintiff blames the Defendant for putting the minor child, Christine, on birth control, even alleging that his own daughter was sleeping around. When the truth of the matter as testified to by Dr. Zipper, it was unrefuted that the child was put on birth control as part of her mental health to level out her hormones. (September 4, 2002 transcript, page 87, lines 2-23). Plaintiff would rather impugn his child's morality than check into the matter to find out that it was really a medically induced decision to put her on birth control.

Plaintiff's pre-trial conduct in obeying Court orders was made an issue at trial. Plaintiff's testimony at trial supported a finding that he was simply able to say anything he wished with no concern for the truth. Plaintiff seems to argue in his brief that he did follow the

specific orders requiring him to pay certain bills and expenses during the course of the litigation. The evidence and admissions do not support Plaintiff. At trial the following documents were introduced into evidence:

1) Status Quo Order

2) Petition for an Order to Show Cause for Failure to Comply with Status Quo Order heard on September 27, 2001.

3) Consent Order for Status Quo dated February 14, 2002.

4) Correspondence to Plaintiff's counsel dated January 7, 2002 regarding cancelled checks and receipts pertaining to reimbursement for the minor child's school related activities and Defendant's counseling sessions totaling $5,036.92.

5) Correspondence to Plaintiff's counsel with receipts for reimbursement to Defendant dated May 10, 2002 totaling $4,676.97.

6) Correspondence to Plaintiff's counsel with receipts for reimbursement to Defendant dated August 16, 2002 totaling $8,383.70.

Contrary to the Court orders, Plaintiff reduced the Defendant's phone service (September 3, 2002 transcript, page 83, lines 11-13), paid the car warranty bill only after petitioned to Court for failure to do so (September 3, 2002 transcript, page 84, lines 4-6), failed to pay the satellite TV service and it was interrupted (September 3, 2002 transcript, page 87, 21-22), permitted to lapse car insurance on vehicle used by daughter (September 3, 2002 transcript, page 91, lines 21 and 22), late on payments to Defendant (September 3, 2002 transcript, page 93, lines 122-125), and failed to pay for one minor child's legitimate school expenses. Plaintiff also admits to failing to comply with orders to pay at September 3, 2002 transcript, page 94, line 22 and

September 3, 2002 transcript, page 97, line 2 and 3. Plaintiff, in review of the two letters identified above, failed to pay approximately $19,215.77 in money that he was required to pay.

The Trial Court made its findings in a written Opinion dated October 4, 2002. It is clear from that Opinion that the Trial Court did not find much credibility in Plaintiff's testimony. In fact, the Trial Court expressed its dissatisfaction with Plaintiff believing that he was simply testifying untruthfully. The Trial Court divided the assets, awarded Defendant alimony, awarded her physical custody of the minor children and child support.

The Trial Court did award the Defendant/Appellee a portion of Plaintiff/Appellant's inherited property. The Trial Court, at Page 5 of its Opinion, justified its decision by stating "This court believes that the wife's assistance in caring for the father [the source of the inherited property] as well as her continuation in the strained marriage for so many years, created a situation whereby she did contribute to the inherited estate."

The Trial Court then went on to provide an alternate justification for the invasion of the inherited property with an analysis of the appropriate case law.

It is clear from the appeal that Plaintiff is challenging only the property award. Of the more than $3,000,000.00 in property at issue, Plaintiff received just under $2,000,000.00 and the Defendant received just over $1,000,000.00.

ARGUMENT

1. PLAINITFF/APPELLANT'S APPLICATION FAILS TO SATISFY THE GROUNDS REQUIRED FOR THE ACCEPTANCE OF THIS APPLICATION.

MCR 7.302(B) provides the grounds for an application for leave to the Supreme Court. Subsection 3 provides that one of the grounds is "The issue involves legal principals or major significance to the State's jurisprudence."

Plaintiff/Appellant would have this Court believe that the Trial Court and the Court of Appeals improperly invaded Plaintiff/Appellant's inherited estate in the court's division of assets in the Judgment of Divorce. Plaintiff/Appellant argues over and over again that the Trial Court ordered a division of assets including the inherited estate based solely upon the fault in the break up of the marriage. It is clear, however, from the opinion written by the trial court that the invasion of the inherited assets were as a result of the Defendant/Appellee's contribution to the acquisition of those assets.

While the Plaintiff/Appellant may disagree with the Trial Court's findings of fact, a dispute over the findings of fact alone ought not justify the application made before the Supreme Court.

Further, MCR 7.302 provides that an application must show that "In an appeal from the decision of the Court of Appeals the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

The Court of Appeals, at Page 2 of its Opinion, clearly acknowledged that contribution to the acquisition of inherited property is grounds for invasion of that inherited property. The Court of Appeals then reviewed the Trial Court's findings of fact justifying its conclusion that the Defendant/Appellee contributed to the acquisition of the inherited estate.

The Plaintiff/Appellant has not shown that the Court of Appeals decision affirming the Trial Court was clearly erroneous.

2. THE TRIAL COURT PROPERLY APPLIED THE LAW IN DETERMINING THE ASSETS OF THE MARITAL ESTATE.

Defendant agrees with the standard of review set forth by Plaintiff.

The first consideration in a divorce proceeding is to define the marital estate. *Reeves* v *Reeves*, 226 Mich App 490, 575 NW2d 1 (1997). The marital estate is generally defined as property accrued during the marriage that is not inherited and/or gifted. In this case, the inheritance issue and its inclusion within the marital estate is at issue. Defendant submits that Plaintiff's inheritance is part of the marital estate. The Courts have concluded that "whether to include an inheritance in the valuation of the marital assets is discretionary and is dependent upon the particular circumstances of a given case". *Wilson* v *Wilson*, 2001 WL 633676 Mich App., June 1, 2001; *Demman* v *Demman*, 195 Mich App 109; 112; 489 NW2d 161 (1992).

As a general rule, the Court has discretion to treat property inherited during the marriage as either marital or separate property. In order to determine whether inherited property is to be treated as marital property, the Court must look to several factors including the following: 1) the length of the marriage, 2) how the parties handled the property, and 3) how the property was titled. The parties in this case have been married for 25 years. The longer the marriage, the more likely the Courts have been to consider the property as part of the marital estate. *Charlton* v *Charlton*, 397 Mich 84 (1976).

The Court did review the appropriate factors. The Court did find that at least some of the inherited property was treated as marital property.

3. THE TRIAL COURT PROPERLY REVIEWED THE EVIDENCE AND LAW AND DETERMINED THAT PLAINTIFF'S INHERITANCE COULD BE DIVIDED AND AWARDED IN PART TO DEFENDANT.

MCL 352.401 provides that inherited property may be awarded to the other spouse if the spouse contributed to the acquisition, improvement, or accumulation of the separate property.

The Trial Court properly found that Defendant contributed to the acquisition of the property by caring for Plaintiff's father during his declining years. She provided such care when her marriage was declining and when her father in law was a less than congenial patient. Plaintiff did provide this care believe that the inheritance would be marital property.

4. THE TRIAL COURT APPLIED THE CORRECT LAW WHEN DIVIDING THE PROPERTY OF THE PARTIES.

The list of factors to determine the division of property includes, but is not limited to, the following: 1) duration of the marriage, 2) the contribution of the parties, 3) the age of the parties, 4) health of the parties, 5) the life status of the parties, 6) necessities and circumstances of the parties, 7) earning ability of the parties, 8) the past relations and conduct of the parties, 9) the interruption of personal career or education of either party during the marriage and 10) general principles of equity. *Sparks* v *Sparks*, 440 Mich 141, 485 NW2d 893 (1992).

The Trial Court reviewed these factors and the evidence. The Defendant remained faithful to her vows and committed everything she had to the marriage. She sacrificed her career opportunities to see to the care of the Plaintiff and their children. Her husband rewarded her with unfaithfulness. She suffered unnecessarily at the Plaintiff's hands both physically and emotionally. Plaintiff's continued affair and his treatment of her during the marriage caused her emotional trauma and stress for which she is seeking treatment. While most people leave their marriage with their fare share of emotional scars, it was cruel of Plaintiff to continue to string the Defendant along through several marriage counselors and failing to take responsibility for his actions in this marriage.

The Defendant had a financially comfortable lifestyle and the same should continue beyond this divorce. Without the award she received, she would be destitute. She had no marketable work skills that would permit her to continue her lifestyle. Neither party should have to suffer unnecessary hardship.

The child support guidelines recommended that child support be awarded to the Defendant to be paid by Plaintiff in this matter. The child support prognosticator recommended $197.00 per week. (**Exhibit A**) The minor child was 17 years of age at the time of trial and was a junior in high school and law mandates child support until approximately June 2003. The support ruling by the Court was correct.

Spousal support was also appropriate in this case. Defendant sought permanent alimony in this case. The factors to be considered in awarding spousal support include: 1) the past relations and conduct of the parties, 2) the length of the marriage, 3) the parties' ability to work, 4) source and amount of property awarded to the parties, 5) the ages of the parties, 6) the ability to pay spousal support, 7) the present situation of the parties, 8) the parties' needs, 9) the parties' health, 10) the prior standard of living of the parties and whether they support others, and 11) the general principles of equity. *Sparks* v *Sparks*, supra.

In this case, the parties had a lengthy marriage of 25 years wherein the Defendant was completely financially dependent on the Plaintiff. As a result, the Defendant's options were limited. Both parties are in good health. Plaintiff is capable of providing permanent spousal support to the Defendant based on his substantial income to date.

The parties' past conduct and relations are relevant. The Plaintiff's actions during the marriage, most specifically since his affair began, were properly considered. The Defendant's

options for a career at the time of trial were very limited. A physically intensive job is unlikely given her back problems.

The Ross Alimony guidelines recommend permanent alimony for $263.00 per week based on the Plaintiff's last 3 years earning and imputing the Defendant with earnings of $50,000.00 annually. **(Exhibit B)**

Without permanent spousal support, it is the Defendant who would decrease her standard of living dramatically. Spousal support should be awarded to equalize the parties' positions in life. Defendant should not have to "dissipate her marital assets to meet daily needs". *Zecchin* v *Zecchin*, 149 Mich App 723; 386 NW2d 652 (1986); *Hanaway* v *Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995). The Plaintiff is able to pay spousal support. The ability to pay includes the unexercised ability to earn income if income is voluntarily reduced. *Knowles* v *Knowles*, 185 Mich App 497; 462 NW2d 777 (1990). The Plaintiff upon receipt of his inheritance stopped working and began managing the inheritance as his profession.

Plaintiff was required to pay attorney fees to Defendant in this case. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the Trial Court's decision absent an abuse of discretion. Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Hanaway* v *Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). A party should not be required to dissipate marital assets to pay for her attorney fees. *Maake* v *Maake*, 200 Mich App 184; 503 NW2d 664 (1993).

RELIEF REQUESTED

This Court should affirm in total the award of the trial court.

Respectfully Submitted,

HARRIS & LITERSKI
Attorneys for Defendant/Appellee

DATED: September 3, 2004

CHARLES W. WIDMAIER (P38376)